YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us



Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

**IN THE SUPERIOR COURT OF STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF YAVAPAI**

| | |
|---|---|
| **STATE OF ARIZONA,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**STEVEN CARROLL DEMOCKER,**<br><br>**Defendant.** | **Cause No. P1300CR20081339**<br><br>**Division 6**<br><br>**STATE'S RESPONSE TO DEFENDANT'S MOTION TO PRECLUDE TESTIMONY OF ERIC GILKERSON AND JOHN HOANG (Filed May 11, 2010)** |

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby responds to Defendant's Motion to Preclude Testimony of Eric Gilkerson and John Hoang and asks that the Motion be denied. The State's position is supported by the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant offers three so-called "events" as sufficient basis for this Court to ignore *Ariz. R. Crim. P.,* Rule 702, which governs the admissibility of expert opinions, and either preclude the testimony of FBI Agent Eric Gilkerson and DPS Criminalist John Hoang or apply invalid standards to the admissibility of the testimony.

First, Defendant offers a presentation made at the D.C. Superior Court conference by Judge Harry Edwards regarding the NAS Report on Forensic Sciences. Second, Defendant

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

offers Senate Bill 1189. This bill, which becomes effective July 29, 2010, enumerates new admissibility standards for expert testimony. Third, Defendant offers information regarding shoe print comparisons obtained during a defense interview of Mr. Gilkerson, compares the information to the hypothetical "perfect-world" scenario regarding the future standards for scientific testimony outlined in the NAS Report and Judge Edward's presentation and claims that because there are discrepancies between the two, Mr. Gilkerson's methods and resultant opinions must be suspect. Clearly, Defendant's offerings are legally unsupported, without merit, and should be summarily rejected without oral argument.

While the presentation by Judge Edwards is certainly educational and compelling, it is comprised of suggestions and recommendations only and has no authority whatsoever. Under Arizona law, neither *Frye*[1] nor *Daubert*[2] is applicable to the comparison-type testing performed by Gilkerson and Hoang. *See Logerquist v. McVey,* 196 Ariz. 470, 476, 1 P.3d 113, 119 (2000); *State v. Murray,* 184 Ariz. 9, 29, 906 P.2d 543, 562 (1995); *see also State v. Runningeagle,* 176 Ariz. 59, 859 P.2d 169, 179 (1993). The enactment of SB 1189, adding A.R.S. § 12-2203 - Admissibility of Expert Opinion Testimony, *will* affect admissibility of expert testimony in the future but does nothing to invalidate the current requirements regarding expert witnesses.

The comparison of the procedures followed by Mr. Gilkerson to the standards proposed in NAS Report is inherently unfair and insincere. In fact, even the requirements of yet-enacted A.R.S. § 12-2203 appear woefully inadequate when compared to the lofty goals outlined in

[1] *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).
[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993).

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

the Report. As Judge Edwards acknowledged, it should be the *aspiration* of every forensic laboratory to "use appropriate protocols and employ highly skilled practitioners," Defendant's Attachment 1, Page 11, ¶ 6, however, it must be noted there is no widespread agreement as to the policies and procedures needed to begin the implementation of the NAS recommendations. The fact is we may be years, if not decades, away from the *mandatory* certifications, the *mandatory* accreditation programs, the *mandatory* peer review, the *standardized* testing and the *standardized* terminology envisioned in the NAS Report. Not even a hearing pursuant to A.R.S. 12-2203 would overcome these perceived shortfalls. More to the point, regardless of the hopes the future, this Court cannot disregard current law.

Rule 702 provides that where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Both Hoang and Gilkerson have had significant training in their respective fields. Each of these witnesses will "indicate that his training and experience qualify him to render enlightened opinions and draw sophisticated conclusions from the particular type of evidence available." *State v. Dixon,* 153 Ariz. 151, 155, 735 P.2d 761, 765 (1987) (citation omitted).

Moreover, expert opinion on tracking and foot impression and other comparison identification have been found to be reliable in those jurisdictions which apply *Daubert.*

> As the Third Circuit stated in *United States v. Carter,* "expert testimony aiding the jury in making [shoe print] comparisons has long been judged admissible by the federal courts." 176 Fed.Appx. 246, 249-50, 2006 WL 1004384, at *3 (3d Cir.2006) (citing *United States v. Rose,* 731 F.2d 1337, 1345-47 (8th Cir.1984)). Other circuits have come to the same conclusion. *See, e.g., United States v. Ross*, 263 F.3d 844, 846 (8th Cir.2001) (holding there was no error in admitting expert

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> testimony by a FBI forensic examiner that "footprints ... found in the snow at the scene of one of the bank robberies" matched the footwear seized from the defendant's car); *United States v. Hendershot,* 614 F.2d 648, 654 (9th Cir.1980).

*United States v. Graves,* 465 F.Supp.2d 450, 459-60 (2006); *See also State v. Murray,* 184 Ariz. 9, 906 P.2d 543 (1995), *United States v, Havvard,* 260 F.3d 597 (7th Cir. 2001) (The district court recognized that establishing the reliability of fingerprint analysis was made easier by its 100 years of successful use in criminal trials).

Equally important is that here the jurors will have the opportunity to examine the evidence for themselves to determine the weight and credibility of the opinions offered by Gilkerson and Hoang. Here, the jurors will be able to make their own comparisons.

***A. Eric Gilkerson***

Eric Gilkerson is a Forensic Examiner with the FBI who has over ten years experience conducting footwear examination. In *United State v. Ford,* 481 F.3d 215, 217 (3rd Cir. 2007), Mr. Gilkerson offered expert testimony "that three partial shoeprints lifted from the counter in the bank were similar to the type of imprints that would be made by the shoes that Ford was wearing when he was apprehended." After a *Daubert* hearing, the District Court determined "the expert shoeprint testimony was based on valid specialized knowledge and would aid the jury in making comparisons between the soles of shoes found on or with the defendant and the imprints of soles found on surfaces at the crime scene." *Id.* at 218.

> In particular, the District Court evaluated the "reliability of the methods and reliability of their application to the case at hand to determine ... whether there is a suitable fit between the proffered opinion and the facts of the case and, second, whether the opinion will be of assistance to the jury." The Court found that there was general acceptance of shoeprint analysis in both the federal courts and the forensic community, the theory has been subject to peer review and publication, the potential error rate is known, and there are standards and

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> techniques commonly employed in the analysis. The Court agreed that **Gilkerson** followed the recognized techniques.

*Id.* at 218-19 (emphasis added).

Mr. Gilkerson has determined that the shoe impressions at the scene are most comparable with a sole present on only three models of La Sportiva shoes. La Sportiva shoes are not common; only four stores in all of Arizona sell this brand of shoe. The Pike's Peak model, which Defendant purchased in 2006, is no longer available through typical retailers and only 3800 pairs of the Pike's Peak model were sold in all of North America. The fact that Defendant purchased a pair of these shoes and that it appears that this type of shoe "closely correspond with" the impressions left outside Carol's home is pivotal.

Whereas the State will establish the reliability of shoe tread comparison by eliciting the same type of testimony from Mr. Gilkerson as he offered in *Ford*, his expert testimony should not be precluded.

***B. DPS Criminalist John Hoang***

Mr. Hoang has over a thousand hours of training in the identification of tire tracks. He will offer testimony regarding the results of his examinations of the photographs of the bicycle tracks taken at the scene, the bicycle tire tracks made by law enforcement using the tires of Defendant's mountain bike and the tires from that bicycle. In his report, Hoang concluded that "[s]imilar tire tread patterns exist between the tire tracks depicted in the images ... and the front and rear bicycle tires," (See Bates 3242-3245.) and that the tires could have made the tracks in the photographs. Hoang also stated a more conclusive association could not be made due to the "limited clarity and proper scale in the images."

Mr. Hoang's testimony will assist the jury in making comparisons between the photographs of the bicycle tire tracks at the scene and the tires from Defendant's mountain

bike. His testimony should not be precluded.

**CONCLUSION:**

Here, Defendant's claims have no basis in Arizona law. Defendant's Motion to Preclude Testimony of Eric Gilkerson and John Hoang filed May 11, 2010, must be denied.

RESPECTFULLY SUBMITTED this 18th May, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this 18th day of May, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

John Sears
511 E. Gurley St.
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

By: _____

**Office of the Yavapai County Attorney**
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110